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No. A-817

In The

Supreme Court of the United States

October Term 1980

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was the judgment of the Circuit Court in conflict with the applicable decisions of this Court when it granted a writ of habeas corpus to an inmate who plead guilty to a charge of rape in the state court when represented by counsel who had not yet investigated the rumored pregnancy of the victim, *i.e.*,

1. Did the Circuit Court fail to give a presumption of regularity to the decisions of the lower courts?

2. Did the Circuit Court fail to give a presumption of correctness to the factual determinations of the state courts?

3. Did the Circuit Court fail to specify on which subdivision of 28 U. S. C. § 2254(d) it was relying to reach a different conclusion than the state courts?

4. Did the Circuit Court impose a duty on petitioner's attorney to investigate a fact that was immaterial because it was not an element of the crime and not the reason for petitioner's guilty plea?

5. Did the Circuit Court fail to give vitality to the doctrine of harmless error?

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Table of Contents	ii
Opinions Delivered by the Courts Below	1
Grounds for Jurisdiction	3
Constitutional Provisions and Statutes Involved in the Case	4
Statement of the Case	7
Argument:	
I. The opinion of the Circuit Court is inconsistent with the holding of this Court in *Sumner v. Mata.*	11
II. The judgment of the Circuit Court was in conflict with the decision of this Court in *Johnson v. Zerbst.*	14
III. The finding of the Circuit Court that Ford did not have effective assistance of counsel when he pled guilty was not consistent with decisions of this Court.	17
Certificate of Service	22
Appendix	App. 1

TABLE OF CASES

Ford v. Parratt, CV 78-L-209 (D. Neb. June 11, 1980) ... 9

Ford v. Parratt, No. 80-1561 (8th Cir. Jan. 21, 1981) ... 3, 21

Gideon v. Wainwright, 372 U. S. 335 (1963) ... 17

TABLE OF CASES—Continued

Pages

Johnson v. Zerbst, 304 U. S. 458 (1937) 14, 17

McMann v. Richardson, 397 U. S. 759 (1970) 18, 21

State v. Ford, No. 9107 (Dist. Ct. Dakota Co., Nebr.) 2

State v. Ford, 200 Neb. 779, 265 N. W. 2d 456 (1978) 2, 9

Sumner v. Mata, 66 L. Ed. 2d 722 (Jan. 21, 1981) 11, 13, 14, 17

Tollett v. Henderson, 411 U. S. 258 (1973) 19, 20, 21

TABLE OF STATUTES

28 U. S. C. § 1201(c) 4

28 U. S. C. § 1254(1) 4

28 U. S. C. § 2254 ..... 5, 9, 13

28 U. S. C. § 2254(d) 13, 14

28 U. S. C. § 2254(d) (1) - (8) 12

Neb. Rev. Stat. § 28-408 (Supp. 1974) 7, 8

TABLE OF CONSTITUTIONS

United States Constitution, Sixth Amendment 4, 17

United States Constitution, Fourteenth Amendment 4, 17

TABLE OF OTHER CITATIONS

Federal Rules of Appellate Procedure, Rule 40 4

Federal Rules of Civil Procedure, Rules 5 and 6 4

Rules of the United States Supreme Court, Rule 20 4

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States Court of Appeals for the Eighth Circuit

   a. Order and Opinion filed January 21, 1981, granting writ of habeas corpus and giving state time to retry petitioner. *See,* Exhibit A.

   b. Order filed February 20, 1981, denying respondent's petition for rehearing and suggestions for rehearing en banc. *See,* Exhibit H.

c. Order filed February 20, 1981, denying respondent's motion for stay of mandate. *See,* Exhibit I.

d. Mandate to the United States District Court for the District of Nebraska. *See,* Exhibit F.

e. Recall of mandate in accordance with directions of the Supreme Court of the United States, dated April 13, 1981, and filed April 15, 1981, with the Clerk of the United States District Court for the District of Nebraska. *See,* Exhibit G.

2. United States District Court for the District of Nebraska

—Order and Memorandum Opinion entered on June 11, 1980, dismissing petitioner's petition for a writ of habeas corpus. *See,* Exhibits D and E.

3. The Supreme Court of the State of Nebraska

—*State v. Ford,* 200 Neb. 779, 265 N. W. 2d 456 (1978), affirming the judgment of the District Court of Dakota County, Nebraska, that petitioner had entered his plea voluntarily and understandingly and had been represented by competent counsel through the original proceedings. *See,* Exhibit C.

4. The District Court of Dakota County, Nebraska

—Findings in the case of *State v. Ford,* Case No. 9107, and order denying defendant's motion for post conviction relief after an evidentiary hearing on whether Ford's plea was voluntarily and understandingly entered. *See,* Exhibit B.

GROUNDS FOR JURISDICTION

1. On January 21, 1981, the United States Court of Appeals for the Eighth Circuit in the case of *Jesse J. Ford v. Robert Parratt, Warden,* No. 80-1561, reversed the judgment of the United States District Court for the District of Nebraska which had denied Jessie J. Ford a writ of habeas corpus. The Circuit Court remanded the case with directions for the district court to vacate the judgment and sentence entered on Ford's plea of guilty to a charge of rape in the District Court of Dakota County, Nebraska, in 1974. "The district court shall further order the state Attorney General's office within 120 days, to either schedule the case for trial or allow the defendant to enter a proper plea of guilty." (*See,* Exhibit A in the Appendix).

2. On February 20, 1981, the Circuit Court denied respondent's petition for rehearing and suggestion for hearing en banc and respondent's motion for stay of the mandate (*See,* Exhibits B and C in the Appendix).

On April 7, 1981, Mr. Justice Harry A. Blackmun of this Court recalled and stayed the mandate of the Circuit Court, conditioned upon the filing of a petition for certiorari on or before May 1, 1981 (*See,* Exhibit D in the Appendix).

3. The petition for a writ of certiorari in this case will be timely if filed on or before May 21, 1981. The mandate of the Circuit Court will be stayed in this case as well if the petition for a writ of certiorari is filed on or before May 1, 1981.

28 U. S. C. § 1254(1) confers jurisdiction on this Court to review the judgment of the Circuit Court in this case where a petition for certiorari is being filed within 90 days of the judgment or decree as required by 28 U. S. C. § 1201(c). According to Rule 20 of this Court, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari runs from the date of the denial of the rehearing.

The petition for rehearing in this case was mailed to the Clerk for filing and to the petitioner's attorney on February 3, 1981, after the judgment of the Circuit Court was filed on January 21, 1981, and a copy of it was then mailed to respondent's attorney. Under Rule 40 of the Federal Rules of Appellate Procedure a petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or local rule. It was not so shortened or enlarged in this case. The motion for rehearing in this case was timely under Rule 40, above, and under Rules 5 and 6 of the Federal Rules of Civil Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. *Sixth Amendment to the United States Constitution*

   In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

2. *Fourteenth Amendment to the United States Constitution*

   [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

3. 28 U. S. C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support

such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

4. Neb. Rev. Stat. § 28-408 (Supp. 1974)

Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will . . . shall be deemed guilty of rape. . . .

STATEMENT OF THE CASE

Petitioner Robert F. Parratt is the Warden of the Nebraska Penal and Correctional Complex. Respondent

Jesse J. Ford is incarcerated in the Nebraska Penal and Correctional Complex under sentence by a state court after judgment entered on his plea of guilty to a charge of rape in 1974 in an incident involving a young couple parked in Dakota County, Nebraska.

The crime of rape was defined by Neb. Rev. Stat. § 28-408 (Supp. 1974): "Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; . . . shall be deemed guilty of rape." The pregnancy of the victim was not an element of the crime but prior to arraignment Ford's attorney advised him there was a rumor that the rape victim was pregnant and that if the case went to trial they would nail the rumor down one way or the other.

Charges of robbery and kidnapping were dismissed against Ford in exchange for his plea of guilty to a charge of rape in the District Court of Dakota County, Nebraska.

At his arraignment, Ford pled guilty to the charge of rape and admitted he had raped the victim. The court accepted his plea and sentenced him to 15-25 years in the Nebraska Penal and Correctional Complex. (The possible sentence was 3-50 years.)

That sentence was affirmed by the Nebraska Supreme Court on direct appeal. Later, in an appeal from denial of post conviction relief, the Nebraska Supreme Court sent the case back to the trial court for an evidentiary hearing on whether Ford's plea was involuntary because he had had ineffective assistance of counsel.

At the evidentiary hearing in the state district court Ford declared, among other things, that he was "under duress because they told me the girl was pregnant." On the other hand, he felt that if she was pregnant, it was in his favor.

The attorney who represented Ford at his arraignment testified he had discussed with Ford the effect on a jury of the rumored pregnancy of the rape victim, of the fact that Ford was black and of his prior conviction of rape. The plea bargains were essentially to the same substance: the counts charged. The attorney was trying to get the rape charge dismissed but could not.

After the evidentiary hearing, the state district court found that there were no promises or threats made to Ford to obtain his plea to the charges, that he had entered his plea voluntarily and understandingly and that he had been represented by competent counsel throughout the original proceedings.

Ford appealed that decision to the Nebraska Supreme Court, claiming his guilty plea was not freely and voluntarily made and promises and threats were made to induce him to plead guilty. The Nebraska Supreme Court in *State v. Ford,* 200 Neb. 779, 265 N. W. 2d 456 (1978), affirmed the decision of the district court.

Robert F. Parratt was respondent in a proceeding under 28 U. S. C. § 2254 wherein inmate Jesse J. Ford applied for a writ of habeas corpus in the United States District Court for the District of Nebraska in a case docketed as *Ford v. Parratt* CV78-L-209.

In his application for a writ of habeas corpus Ford alleged his conviction was unlawfully induced or not made

voluntarily with understanding of the nature of the case because, among other things, he was threatened by being told that the victim was pregnant and if he didn't plead guilty the victim's pregnancy would surely hang him. The case was submitted to the court on the record from the state court.

In his brief in the district court in this habeas corpus proceeding Ford chose not to challenge the finding of the state district court that no promises or threats were made to him to obtain a guilty plea.

The principal argument advanced by Ford in the district court was that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing him to plead guilty to rape. (This specific argument was never presented to the Nebraska Supreme Court although his case was before that court three times.)

The writ was denied. The district court held that "the state post conviction court's finding that no promises or threats were made is entitled to a presumption of correctness and that Ford has not shown this finding to be erroneous."

Jesse J. Ford then appealed to the United States Court of Appeals for the Eighth Circuit and his appeal was docketed as case No. 80-1561. Again his principal argument was that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape.

The court reversed the order of the district court denying Mr. Ford's habeas corpus petition and remanded

the case with instructions to the district court to order his judgment and sentence vacated and to order the state Attorney General's Office within one hundred twenty (120) days either to schedule the case for trial or to allow Mr. Ford to enter a proper plea of guilty. A copy of this opinion was mailed to the warden's attorney by the court.

On February 3, 1981, the warden petitioned the Court of Appeals for the Eighth Circuit for a rehearing with a suggestion for rehearing en banc. On February 9, 1981, the warden moved for a stay of the mandate. His motion for rehearing was denied by an order filed February 20, 1981, and mailed to the warden's attorney. His motion for a stay was denied by an order filed February 20, 1981, and mailed to the warden's attorney.

The mandate of the Court of Appeals was filed with the Clerk of the United States District Court for the District of Nebraska on March 9, 1981. It was recalled by the Circuit Court on April 13, 1981, in response to an Order to Stay granted by this Court (Mr. Justice Harry A. Blackmun) on April 7, 1981, conditioned on a petition for a writ of certiorari being filed on or before May 1, 1981.

ARGUMENT

I.

The opinion of the Circuit Court is inconsistent with the holding of this Court in Sumner v. Mata.

After an evidentiary hearing on whether Ford's guilty plea was voluntarily and intelligently made, the state district court found:

> that there were no promises or threats made to the Defendant to obtain his plea to the charges. That the Defendant entered his plea to said charges voluntarily and understandingly, and that he was represented by competent counsel th. ughout the original proceedings. Therefore, motion for post conviction relief in this matter is denied.

Exhibit B.

On appeal to the Nebraska Supreme Court, that court found:

> The record here establishes that the defendant was represented by competent counsel throughout the original proceedings. The finding of the District Court that the defendant's plea of guilty was understandingly and voluntarily made and not induced by threats and promises is supported by the record.

Exhibit C. at 781.

In the habeas corpus action in the United States District Court for the District of Nebraska the case was presented on the record from the state court. The court pointed out that Ford had not alleged any of the facts in 28 U. S. C. § 2254 (d) (1) - (8) by which the presumption of correctness could be set aside and that he appeared to have been afforded a full and fair hearing in state court. It found that "[t]he testimony presented to the state post-conviction court was conflicting and that court's finding that no promises or threats were made to induce the guilty plea is fairly supported by the record as a whole." The court held "that the state post-conviction court's finding that no promises or threats were made is entitled to a pre-

sumption of correctness and that Ford has not shown this finding to be erroneous." Exhibit D. at 4.

That decision of the district court on June 11, 1980, anticipated the decision of this Court on January 21, 1981, in *Sumner v. Mata*, 66 L. Ed. 2d 722. *Sumner v. Mata* was also a *habeas corpus* action decided on the identical record before the state court.

This Court recognized the inevitable friction likely when a writ is issued on the behest of a petitioner under 28 U. S. C. § 2254, effectively overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted. It acknowledged the intent of Congress to minimize that friction by establishing "that the findings made by the state court system 'shall be presumed to be correct' unless one of seven conditions specifically set forth in § 2254 (d) was found to exist by the federal habeas court" or the Court concludes the relevant state determination is not fairly supported by the record. This Court held:

> [A] habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record."

Supra at 734.

The Circuit Court in the present case cited no subsection of 28 U. S. C. § 2254 (d) when it reached a different conclusion than the two state courts and one federal court below on whether promises or threats were made to Ford to obtain his plea to the charges.

The Circuit Court did set out the reasoning by which it reached a different conclusion than the state court on

the same set of facts. However, it did not look at that record to see if it contained facts to support the findings of the state court, an approach required to reach a conclusion that the state finding was "not fairly supported by the record." (As the district court below pointed out after it reviewed the same record, there *was* conflicting evidence.)

Instead, the Circuit Court looked at the facts *de novo* and reached its own conclusion. That is, it *inferred* that Ford pled guilty because of the rumored pregnancy of the rape victim, not because he wanted to get a lesser sentence as Ford himself testified. Having found that the rumor "trigger[ed] the decision to plead guilty," the court concluded his attorney had a duty to investigate such a "significant" issue before allowing him to plead guilty. By not doing so he gave Ford ineffective assistance of counsel. Without the effective assistance of counsel his plea could not be voluntarily and intelligently given. Such an approach is inconsistent with 28 U. S. C. § 2254(d) and *Sumner v. Mata.*

Petitioner urges this Court to grant him a writ of *certiorari* because a federal court of appeals in this case has decided a federal question in conflict with an applicable decision of this Court.

II.

The judgment of the Circuit Court was in conflict with the decision of this Court in Johnson v. Zerbst.

Johnson v. Zerbst, 304 U. S. 458 (1937), was a *habeas corpus* proceeding in which the petitioner claimed his guilty

plea was not voluntarily and intelligently made because he was not represented by counsel at the time and had not waived his right to be represented by counsel.

The district court in that case had held that proceedings denying petitioner his constitutional right to assistance of counsel were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal." The circuit court affirmed. This Court granted *certiorari* to determine the scope of review in *habeas corpus* proceedings. It reviewed their history:

> The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities —not involving the question of jurisdiction—occurring during the course of trial; and the "writ of *habeas corpus* cannot be used as a writ of error." These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, "it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court" and the petitioned court has "power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry [involves] an examination of facts outside of, but not inconsistent with, the record." Congress has expanded the rights of a peti-

tioner for *habeas corpus* and the ". . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the Act of 31 Car. II. chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. . . .

Supra at 465, 466. The Court held:

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty.

Id. at 467.

It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity.

Id. at 468.

It can hardly be argued that the Circuit Court has given the judgments of the lower courts such a presumption of regularity. On the identical record before those courts it substituted its judgment that an inference it drew outweighed conclusions of the lower courts supported by the record.

This does not even meet the preponderance of the evidence burden stated in *Johnson v. Zerbst,* above, at 469. Now, as this Court stated in *Sumner v. Mata,* above, by enacting 28 U. S. C. § 2254 (d) "Congress meant to insure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard in such a situation." *Supra* at 734.

Petitioner asks this Court to grant a writ of *certiorari* in this case to review a decision of the Circuit Court which failed to give a presumption of regularity to the judgments of the lower courts.

III.

The finding of the Circuit Court that Ford did not have effective assistance of counsel when he pled guilty was not consistent with decisions of this Court.

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

This Court held in *Gideon v. Wainwright,* 372 U. S. 335 (1963), that a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law within the meaning of the Fourteenth Amendment.

In *McMann v. Richardson*, 397 U. S. 759 (1970), this Court recognized that the duty owed to the accused by his attorney may vary, depending on whether the client pleads guilty or not guilty.

> A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged.

Supra at 766. (In the present case Ford admitted he had raped the victim.)

> That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U. S. at 748, 25 L. Ed. 2d at 756.

Id. at 766.

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the

> good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. . . . That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

Id. at 769, 770.

In *Tollett v. Henderson,* 411 U. S. 258 (1973), the petitioner attempted to vacate his guilty plea by showing that the grand jury which indicted him had unconstitutionally excluded Negroes and he had not knowingly waived his right to have a properly selected grand jury. The Court held that he must also prove that his attorney's advice to plead guilty was made without inquiring into the composition of the grand jury and that such advice was outside the range of competence demanded of attorneys in criminal cases. It reaffirmed its prior holding:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann [McMann v. Richardson, *supra*].

Supra at 267.

Ford has chosen to do that by trying to show that his trial attorney should have investigated the rumored pregnancy of the rape victim before he allowed Ford to plead guilty to the rape charge. However, evidence of whether she was pregnant or not was immaterial because it was not an element of the crime of rape. It should also have been inadmissible. Therefore his attorney had no duty to investigate whether the victim was pregnant and his failure to do so did not prejudice Ford. As this Court said in *Tollett*, above, at 267, 268:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant . . . [has] show[n] that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.
>
> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution.

The facts from the state court in this case support a finding that Ford's attorney successfully negotiated a plea bargain that in exchange for a plea of guilty by Ford to the charge of rape, the county attorney would drop the robbery and kidnapping charges but would make no recommendation about what sentence should be imposed. They support a finding that Ford gave that plea voluntarily and

understandingly as determined by the state district court in an evidentiary hearing on that point.

The finding of the Circuit Court, inferred from those same facts, that the possible pregnancy of the rape victim triggered Ford's decision to plead guilty, is counter to Ford's own testimony. The court's characterization of the possible pregnancy of the victim as a "key factual issue" which defense counsel had a duty to investigate was based on that inference.

These findings of the Circuit Court and its conclusion that therefore Ford had ineffective assistance of counsel is counter to the standards in *McMann* and *Tollett*, above. Ford's counsel could hardly have anticipated that a reviewing court would find he had a constructive duty to investigate a fact which was not an element of the crime and which he probably could have kept out of the record if the case had proceeded to trial.

WHEREFORE, your petitioner prays that this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit, issued January 21, 1981, in the case of *Ford v. Parratt*, No. 80-1561.

Respectfully submitted,

ROBERT F. PARRATT, Warden,
Petitioner,

By PAUL L. DOUGLAS
Attorney General
for the State of Nebraska

By MARILYN B. HUTCHINSON
Assistant Attorney General
for the State of Nebraska

His Attorneys

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Certiorari was served on all parties required to be served by depositing a copy of it with sufficient first class postage attached in a United States Post Office addressed to respondent's attorney, J. William Gallup, Penthouse, Farm Credit Building, Omaha, Nebraska 68102, on this — day of April, 1981.

.....

Marilyn B. Hutchinson
Assistant Attorney General
for the State of Nebraska

Member of the Bar of this Court

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 80-1561

Jesse J. Ford,
Appellant,

vs.

Robert F. Parratt, Warden,
Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: October 17, 1980
Filed: January 21, 1981

Before HEANEY, ADAMS,* and STEPHENSON,
Circuit Judges.

HEANEY, Circuit Judge.

* The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

This is an appeal from an order of the United States District Court for the District of Nebraska denying the appellant's petition for a writ of habeas corpus under 28 U. S. C. § 2254. We reverse and remand with instructions.

I

Appellant Ford entered a plea of guilty to the charge of rape pursuant to a plea negotiation in which the State of Nebraska agreed to drop robbery and kidnapping charges which arose out of the same incident. The state district court sentenced Ford to an indeterminate term of not less than fifteen, nor more than twenty-five years in the Nebraska Penal and Correctional Facility. Ford appealed the conviction to the Nebraska Supreme Court, challenging the severity of the sentence. The conviction and the district court's sentence were affirmed. *State v. Ford,* 194 Neb. 400, 231 N. W. 2d 515 (1975).

Thereafter, Ford filed a motion for post conviction relief, asserting that his plea of guilty was not made voluntarily and understandingly. The state district court denied him an evidentiary hearing on his motion. He appealed this order to the Nebraska Supreme Court. The Nebraska Court vacated the order of the district court and remanded the case for a complete evidentiary hearing on Ford's motion to vacate and set aside his sentence. *State v. Ford,* 198 Neb. 376, 252 N. W. 2d 643 (1977).

After a hearing, the state district court determined that his guilty plea was voluntarily and understandingly made. Ford appealed this order and it was affirmed by

the Nebraska Supreme Court. *State v. Ford,* 200 Neb. 779, 265 N. W. 2d 456 (1978).

On September 19, 1978, Ford filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the District of Nebraska. On June 11, 1980, the district court entered its order denying the petitioner's requested relief.

Appellant Ford argues on appeal that his guilty plea should be vacated on two separate and independent constitutional grounds: (1) that his plea was entered without effective assistance of counsel, thus it was not voluntarily and knowingly made; and (2) that the trial judge who accepted his plea did not comply with *Boykin v. Alabama,* 395 U. S. 238 (1969), thus the defendant entered his guilty plea without a full understanding of what the plea connotes and its consequences. Since we determine that Ford's guilty plea was entered without effective assistance of counsel, we find it is unnecessary to discuss the appellant's alternative argument.

II

For over fifteen years, it has been clear beyond doubt that a defendant pleading guilty to a felony charge has a federal constitutional right to the assistance of counsel. *White v. Maryland,* 373 U. S. 59, 59-60 (1963); *Arsenault v. Massachusetts,* 393 U. S. 5, 6 (1968). *See also McMann v. Richardson,* 397 U. S. 759, 771 n. 4 (1970); *McQueen v. Swenson,* 498 F. 2d 207, 213 (8th Cir. 1974). Furthermore, as we stated in *McQueen v. Swenson, supra,* "[s]ince the days of the 'Scottsboro boys' rape case, *Powell v. Alabama,* 287 U. S. 45 (1932), it has also been accepted that a state

defendant has a right not only to the timely appointment of counsel but also to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness. *McQueen v. Swenson, supra,* 498 F. 2d at 213. *See McMann v. Richardson, supra,* 397 U. S. at 771 n. 14; *Reece v. Georgia,* 350 U. S. 85, 90 (1955); *Glasser v. United States,* 315 U. S. 60, 69-70 (1942).

In this Circuit, counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *See Morrow v. Parratt,* 574 F. 2d 411, 412 (8th Cir. 1978); *Benson v. United States,* 552 F. 2d 223, 224 (8th Cir. 1977), *cert. denied,* 434 U. S. 851 (1977). We evaluate a habeas corpus petition alleging ineffective assistance of counsel through a two-step analysis. First, the petitioner must establish that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have performed under the same set of circumstances. Second, the petitioner must show that his lawyer's ineffectiveness prejudiced him.

Here, the appellant asserts that counsel's failure to investigate an unsubstantiated rumor that his alleged rape victim was pregnant constituted ineffective assistance of counsel. We have addressed the question of how thorough an attorney's pretrial investigation must be before he may intelligently advise his client to plead guilty. In *Morrow v. Parratt, supra,* we stated that "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses." *Morrow v. Parratt, supra,* 574 F. 2d at 413. *See also Benson v. United States, supra,* 552 F. 2d at 225.

There is nothing in this record that indicates that the appellant's attorney engaged in *any* pretrial investigation. At the remand hearing, only one aspect of the defense attorney's investigation was broached—the rumored pregnancy. What is crystal clear from the record is that the defendant's lawyer did absolutely nothing to determine whether the rumor was true. The attorney testified at the remand hearing that the unsubstantiated rumor was communicated to the defendant the day of his arraignment; he told the defendant that "as we would go to trial we would nail it down one way or the other."

Notwithstanding the fact that the rumor was unsubstantiated, the defendant's attorney, assuming its truth, used its negative implication to persuade his client to plead guilty. The record shows that up until the morning of the arraignment, and specifically until the conversation wherein the defendant was confronted with the possibility of the victim's pregnancy, Ford had no intention to plead guilty.

The record indicates that even after the rumor was communicated to the defendant, he was disinclined to plead, reasoning that if she were pregnant, it would favor his case because he didn't impregnate her. The appellant stated at the remand hearing that in response to this reasoning, his attorney told him "they'd give her an abortion and, looking at me, 'cause I'm black and big; big and black, the jury would automatically convict me whether I was

guilty or not."[1] Thereupon, the defendant pleaded guilty to the charge of rape.[2]

We determine that when an unsubstantiated issue is deemed by both counsel and client to be significant enough to trigger the decision to plead guilty, then there arises a duty on the part of the defense counsel to obtain the specifics surrounding the key factual issue. Such a duty necessarily demands thorough investigation. We have long required that counsel be afforded the opportunity and in fact "make such *preparations for the arraignment* and trial as the facts of the case fairly demand * * *." *McQueen v. Swenson, supra,* 498 F. 2d at 216 (quoting *Maye v. Pescor,* 162 F. 2d 641, 643 (8th Cir. 1947) (emphasis added). Here, counsel's failure to investigate and determine the truth of the rumored pregnancy, in conjunction with his using the rumor to persuade Ford to plead guilty, constitutes failure to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances.

We disagree with the court below that the appellant was not prejudiced by his counsel's failure to adequately investigate the rumored pregnancy. In *McQueen v. Swenson, supra,* we stated that the prejudice element in a habeas analysis is necessary "because the failure to investigate—though a constitutional error—might in certain circum-

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1 The defendant's lawyer testified at the remand hearing that he could not recall making the statement; he said he did not think he made the statement because, looking at the defendant the afternoon of the remand hearing, he didn't appear to be that large. This is hardly an effective denial.

2 At the remand hearing, on appeal to the Nebraska Supreme Court, and before the federal district court, the appellant urged that his plea was induced by a promise of a two-year sentence and the threat of five fifty-year sentences running back to back if the guilty plea was not entered. The appellant has not forcefully argued this position on appeal and we determine that it is unnecessary to address it here.

stances be a 'harmless' one and hence would not justify habeas corpus relief." *Id.*, 498 F. 2d at 218. Within a trial context, in order to secure habeas corpus relief, the petitioner must show that the ineffective assistance of counsel prejudiced his ability to prepare a defense. *Id.* at 220. *See DuPree v. United States,* 606 F. 2d 829, 831 (8th Cir. 1979), *cert denied,* 445 U. S. 919 (1980); *United States v. Easter,* 539 F. 2d 663, 666 (8th Cir. 1976).

Within the context of an arraignment hearing, however, where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to competently investigate any material facts prejudiced the defendant's ability to make an intelligent and voluntary plea of guilty. We feel that in this case, counsel's failure to substantiate the rumored pregnancy and his using the rumor as a tool to force the defendant to plead guilty prejudiced Ford's ability to make an intelligent and knowing decision. The resulting prejudice was not "harmless."[3]

III

The appellee contends that the Supreme Court's decision in *McMann v. Richardson, supra,* compels us to affirm the order of the district court denying the appellant's habeas corpus petition. We disagree. *McMann v. Richardson, supra,* and its two companion cases, *Brady v.*

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3 Although the offense with which Ford is charged is alleged to have occurred in July, 1974, there is nothing in the record to indicate, and the appellee has never argued, that the state will be prejudiced in any way if the matter were to be set for trial at this time. Furthermore, the record does not establish that the evidence against the defendant is so overwhelming that the state was cerain to obtain a conviction.

United States, 397 U. S. 742 (1970); *Parker v. North Carolina*, 397 U. S. 790 (1970), are generally known as the *Brady* trilogy. All three cases dealt with the effect of a guilty plea on the later assertion of claimed violations of certain constitutional rights.

In *Brady v. United States, supra*, the Court ruled that an otherwise valid guilty plea to a violation of the Federal Kidnapping Act was voluntarily and knowingly entered notwithstanding the fact that what motivated the plea was the defendant's decision to avoid the death penalty. Although the death penalty provision in the statute was invalidated on constitutional grounds, the plea was nevertheless not susceptible to collateral attack. *Brady v. United States, supra*, 397 U. S. at 751. In *Parker v. North Carolina, supra*, the Court determined that an otherwise valid guilty plea to first degree burglary was not subject to attack on the basis that his coerced confession to the crime was received unconstitutionally and was, therefore, actually inadmissible. The defendant argued that since his confession was the primary motivating factor in his decision to plead guilty, necessarily his plea was tainted. The Court disagreed, citing *McCann v. Richardson, supra*. *Parker v. North Carolina, supra*, 397 U. S. at 796-797.[4] In *McMann v. Richardson, supra*, the Court determined that a guilty plea, which was entered on reason-

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4 The defendant in *Parker v. North Carolina*, 397 U. S. 790 (1970), also asserted that the grand jury which indicted him was selected in such a manner that members of his race were systematically excluded. The court determined that the question was not timely raised and, therefore, affirmed the lower court's decision that relief was unavailable. *Parker v. North Carolina, supra*, 397 U. S. at 798. *See Tollett v. Henderson*, 411 U. S. 258, 266-267 (1973).

ably competent advice of counsel, was not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. *McMann v. Richardson, supra,* 397 U. S. at 770. Finally, in *Tollett v. Henderson,* 411 U. S. 258 (1973), the Court ruled that when a defendant enters a guilty plea upon the reasonably competent advice of counsel, he is not automatically entitled to federal collateral relief upon the showing that the indicting grand jury was unconstitutionally selected. *Id.* at 266.

A careful reading of these cases reveals that the *Brady* trilogy and *Tollett,* by their own terms, do not stand as a bar to this Court's granting the appellant his requested relief here. One common thread running throughout the *Brady* trilogy and *Tollett* is that a guilty plea is not subject to attack *unless* it was made without reasonably effective assistance of counsel, or was otherwise involuntarily or unintelligently entered. *Brady v. United States, supra,* 397 U. S. at 754-756; *McMann v. Richardson, supra,* 397 U. S. at 770-771; *Parker v. North Carolina, supra,* 397 U. S. at 797-798; *Tollett v. Henderson, supra,* 411 U. S. at 266-268. Since we determine that the appellant did not secure his constitutionally required effective assistance of counsel, *Brady* and its progeny do not stand as a bar to this Court's decision to grant Ford habeas corpus relief.

Accordingly, the order of the district court denying the appellant's habeas corpus petition is reversed and remanded with instructions to the district court to order the defendant's judgment and sentence vacated. The district court shall further order the state attorney general's of-

fice, within 120 days, to either schedule the case for trial or allow the defendant to enter a proper plea of guilty.

ADAMS, Circuit Judge, dissenting.

Although I agree with the majority that ineffective assistance of counsel may vitiate a guilty plea, I believe it can only do so when there is a nexus between the alleged ineffective assistance and the guilty plea itself.

Here, the claimed ineffective assistance of counsel is that the defendant's attorney did not investigate the rumor that the prosecutrix was pregnant. Although I agree that it would have been preferable had the source of the rumor been tracked down, I do not see, based on the record here, how exploring the rumor would have caused the defendant not to enter the guilty plea. Indeed, the record shows that the defendant, whether rightly or wrongly, believed that the fact of pregnancy might have helped his defense.[1]

More importantly, perhaps, the defendant did not testify at the hearing on his petition for habeas that the fact of pregnancy influenced his decision to plead guilty. In fact, he testified that the sole reason for the plea was his desire to obtain a reduced sentence. After the trial judge imposed a 15-25 year sentence penalty, the defendant's appeal to the Nebraska Supreme Court was predicated solely on the length of incarceration.

As this Court stated in *Morrow v. Parratt*, 574 F. 2d 411, 412-413 (8th Cir. 1978):

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1 In the proceedings accompanying the guilty plea, the defendant admitted that he had had a forcible relationship with the prosecutrix.

> "The evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process in this circuit." *Rinehart v. Brewer*, 561 F. 2d 126, 131 (8th Cir. 1977). First, the defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. [Citations omitted.] Secondly, the defendant must show that he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. [Citations omitted.]

In *Morrow*, the Court specifically noted that the discovery of facts in question "may have completely changed the defense strategy." No such determination was made by the witnesses here or by the trial court, and, on the basis of the evidence, it is difficult to see how such a determination could have been made. Assuming *arguendo* that the defendant met the first step in the *Morrow* test, the absence of connection between the pregnancy rumor and his motives for pleading guilty precluded a finding of material prejudice.[2]

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2 Recently, in en banc decisions, two other circuits have determined that a defendant bears the burden of demonstrating that actual prejudice ensued from the alleged ineffective assistance of counsel. These courts held that the prejudice requirement is compelled by the Sixth Amendment. *United States v. Decoster*, No. 72-1283 (D. C. Cir. July 10, 1979); *Cooper v. Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U. S. 974 (1979).

Commentators have observed that *Decoster* denotes a trend toward imposing a more stringent standard on a defendant before he will be granted a new trial as a result of ineffective assistance. *See, e. g.*, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053 (1980); Comment, *Defendant Must Prove Counsel's Serious Incompetence and Likelihood that Such Incompetence Had an Effect on the Outcome*—United States v. Decoster, 53 Temp. L. Q. 193 (1980).

The opinion of this Court in *Todd v. Lockhart*, 490 F. 2d 626 (8th Cir. 1974), is an effective answer to petitioner's second contention on appeal, namely, that the trial court committed reversible error in the manner in which it addressed defendant in the course of accepting his guilty plea. Although the trial court may not have recited to the defendant all of the factors bearing on accepting a plea contemplated in *Boykin v. Alabama*, 395 U. S. 238 (1969), it was fully adduced at Ford's post-conviction evidentiary hearing that his guilty plea was entered knowingly and voluntarily. Under *Todd*, this post-conviction determination cures any error the trial court may have committed.

Accordingly, and with all due respect to my distinguished colleagues, I would deny the petition for habeas corpus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

EXHIBIT B

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

JESSE JAMES FORD,
Defendant.

Case No. 9107

JOURNAL ENTRY

NOW on this 27th day of July, 1977, this Court having heard evidence pertinent to Defendant's Motion for post conviction hearing on May 12, 1977, at which time the State of Nebraska was represented by Don A. Fitch, County Attorney of Dakota County, Nebraska and the Defendant appeared in person and with his attorney, Thomas A. Vakulskas. All parties appearing in open Court and evidence having been adduced and the matter taken under advisement, the Court now finds that there were no promises or threats made to the Defendant to obtain his plea to the charges. That the Defendant entered his plea to said charges voluntarily and understandingly, and that he was represented by competent counsel throughout the original proceedings. Therefore, motion for post conviction relief in this matter is denied.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion for Post Conviction Relief shall be and the same hereby is denied.

BY THE COURT:
/s/ Lloyd W. Kelly, Jr.
District Judge

EXHIBIT I

EXHIBIT C

69 SCJ 779

Advanced Sheets

VOL. 200] JANUARY TERM, 1978 779

State v. Ford

STATE OF NEBRASKA,

Appellee,

vs.

JESSE JAMES FORD,

Appellant.

— N. W. 2d —

Filed May 3, 1978. No. 41732.

1. Criminal Law: Guilty Pleas: Attorney and Client. A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advise was within the range of competence demanded of attorneys in criminal cases.
2. Criminal Law: Guilty Pleas: Attorney and Client: Post Conviction. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing.

Appeal from the District Court for Dakota County: Lloyd W. Kelly, Jr., Judge. Affirmed.

Thomas A. Vakulskas, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before White, C. J., Spencer, Boslaugh, McCown, Clinton, Brodkey, and White, JJ.

White, C. Thomas, J.

This is an appeal from an order of the District Court denying post conviction relief to defendant following an evidentiary hearing. The District Court found that defendant's plea of guilty to a charge of rape was understandingly and voluntarily made. We affirm the decision of the District Court.

The defendant was originally charged with two counts of robbery, two of kidnapping, and one of rape. Pursuant to a plea bargain, the robbery and kidnapping charges were dropped and defendant entered a plea of guilty to the rape charge which was accepted by the court. The defendant was sentenced to a term of 15 to 25 years in the Nebraska Penal and Correctional Complex. This court upheld the sentence. State v. Ford, 194 Neb. 400, 231 N. W. 2d 515. The District Court dismissed the defendant's motion to vacate the sentence without an evidentiary hearing. This court vacated that order and remanded the cause for an evidentiary hearing. State v. Ford, 198 Neb. 376, 252 N. W. 2d 643. The appeal is from the finding pursuant to that hearing.

At the evidentiary hearing, the defendant, his wife, mother, sister, aunt, and the husband of his cousin testified that, prior to the defendant's arraignment, his attorneys had promised him a sentence of 3 to 15 years if he plead guilty to the charge of rape and a sentence of 50 years on each of the 5 charges against him if he did not. Defendant stated that he felt he would only have to serve 2 years. The attorneys who represented the defendant at his arraignment denied promising the defendant a 3 to 15 year sentence in return for his guilty plea. They testified that the defendant was fully advised of the terms of the plea bargain, i.e., a reduction of defendant's bond

would not be opposed and the robbery and kidnapping charges dismissed. The attorneys testified that sentencing procedures were discussed with the defendant, but a specific sentence was not promised as part of the plea bargain.

The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion.

A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. See State v. Hall, 188 Neb. 130, 195 N. W. 2d 201. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. See State v. Krider, 191 Neb. 285, 214 N. W. 2d 611.

The record here establishes that the defendant was represented by competent counsel throughout the original proceedings. The finding of the District Court that the defendant's plea of guilty was understandingly and voluntarily made and not induced by threats and promises is supported by the record.

The judgment of the District Court is affirmed.

Affirmed.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JESSE J. FORD,

Petitioner,

vs.

ROBERT F. PARRATT, Warden,

Respondent.

Civ. 78-L-209

MEMORANDUM OPINION

(Filed June 11, 1980)

This action is a 28 U. S. C. § 2254 petition for a writ of habeas corpus. The petitioner, Jesse J. Ford, pled guilty to a charge of rape and now challenges his conviction and sentence of fifteen to twenty-five years. Although numerous issues were raised by Ford in his initial *pro se* petition, counsel has since been appointed and the petitioner's claims have been narrowed to three:

(1) That Ford's plea of guilty was induced by threats and promises;

(2) That Ford was deprived of the right to effective assistance of counsel;

(3) That the trial court's failure to comply with *Boykin v. Alabama,* 395 U. S. 238 (1969), requires that the plea be vacated.

The respondent denies the above allegations and also raises exhaustion issues. The parties have agreed to submit the case on the record developed at the state post-conviction hearing, the Court has so ordered, and the matter is presently before the Court and ready for disposition.

STATE COURT PROCEEDINGS

Ford was originally charged in the District Court for Dakota County, Nebraska, with two counts of robbery, two counts of kidnapping and one count of rape. Pursuant to a plea bargain, the robbery and kidnapping charges were dropped and Ford entered a plea of guilty to the rape charge which was accepted by the court. Ford was sentenced to a term of fifteen to twenty-five years. On appeal Ford assigned as error the severity of the sentence and the imposition of a minimum term in excess of one-third of the maximum actually imposed. The Nebraska Supreme Court affirmed the judgment and sentence of the district court. *State v. Ford,* 194 Neb. 400, 231 N. W. 2d 515 (1975).

In a post-conviction proceeding to vacate and set aside the sentence, Ford alleged

> that his guilty plea was not voluntary because his court-appointed attorney told him that he would not receive a sentence in excess of 3 to 15 years imprisonment, and that he would not serve more than 2 years on the sentence. He also alleged that he was threatened with "five (5) fifties (50) back to back"; that he was told that the rape victim was pregnant and a local jury would hang him; and that his attorney threatened to quit if he did not follow his advice.
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> *State v. Ford,* 198 Neb. 376, 377, 252 N. W. 2d 643, 644 (1977).

The district court denied Ford an evidentiary hearing and dismissed the motion. The Nebraska Supreme Court remanded with directions to grant an evidentiary hearing since it found that the record did not affirmatively disclose that Ford's plea was entered understand-

ingly and voluntarily. *State v. Ford, supra,* 198 Neb. at 378, 252 N.W. 2d at 644. The Supreme Court observed that in response to the district court's question at the arraignment as to whether any promises or threats were made to induce the guilty plea, the county attorney had interrupted before Ford had an opportunity to respond and the county attorney informed the court of the plea bargaining agreement. Upon concluding his explanation of the plea bargain, the county attorney asked Ford if there was any other matter which was a part of the plea bargain, and Ford responded, "No." The defendant was not asked again, however, whether any threats or promises were made. Citing *Boykin v. Alabama,* 395 U.S. 238 (1969), the Nebraska Supreme Court noted that a waiver of rights cannot be presumed from a silent record. Therefore, the court ruled that an evidentiary hearing was necessary to determine whether Ford's plea was understandingly and voluntarily entered and whether Ford had the effective assistance of counsel. *State v. Ford, supra,* 198 Neb. at 378, 252 N.W. 2d at 644.

At the evidentiary hearing, Ford and five members of his family testified that, prior to Ford's arraignment, his attorney had promised him a sentence of three to fifteen years if he pled guilty and threatened a sentence of fifty years on each of the five charges if Ford went to trial. Ford also testified that his attorney told him that the victim was pregnant and that a local jury would hang him. Ford's attorney testified that Ford was fully advised of the terms of the plea bargain, the various sentences that were possible, and the possibility of the victim's pregnancy. With regard to the pregnancy of the victim, Ford's attorney testified that Ford was informed

that it was an unsubstantiated rumor that they would "nail down one way or the other" as they went to trial.

The district court found that Ford's plea of guilty was understandingly and voluntarily made and that he was represented by competent counsel. The Nebraska Supreme Court affirmed. *State v. Ford,* 200 Neb. 779, 265 N.W. 2d 456 (1978). This habeas corpus petition followed.

I.

Ford's primary contention at the state post-conviction hearing was that his guilty plea was induced by his attorney's promises of a short sentence if he pled guilty, threats of a long sentence if he went to trial, and statements that the victim was pregnant. This issue was also raised in Ford's habeas petition, but in his brief he has chosen not to challege the finding of the district court at the post-conviction hearing that no promises or threats were made to Ford to obtain a guilty plea. Pursuant to 28 U.S.C. § 2254(d), a presumption of correctness attaches to state court determinations evidenced by a written finding after a full and fair evidentiary hearing. Once the presumption is properly invoked, the habeas petitioner bears the burden of proving by "convincing" evidence that the state court finding was erroneous. *Lyle v. Wyrick,* 565 F. 2d 529, 532 (8th Cir. 1977), *cert. denied,* 435 U.S. 954 (1978). In the present case, Ford does not allege any of the exceptions (42 U.S.C. § 2254(d)(1)-(8)) to invocation of the presumption of correctness and appears to have been afforded a full and fair hearing in state court. The testimony presented to the state post-conviction court was conflicting and that court's finding

that no promises or threats were made to induce the guilty plea is fairly supported by the record as a whole. Accordingly, this Court holds that the state post-conviction court's finding that no promises or threats were made is entitled to a presumption of correctness and that Ford has not shown this finding to be erroneous.

II.

The principal argument presently advanced by the petitioner is that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape. At the post-conviction evidentiary hearing, Ford testified that, prior to his arraignment, he and members of his family were discussing with his attorney whether to accept a plea bargain when his attorney asked his family to leave for a few minutes. At that time, Ford testified, one of his attorneys told him that the victim was pregnant and that a jury would automatically convict him. Ford's family members confirmed his testimony that they were asked to leave Ford and his attorney, and Ford's wife testified that, after they returned, Ford told her about the victim's pregnancy. Robert Scoville, Ford's principal attorney at the arraignment, testified that he did not remember when he had told Ford of the rumored pregnancy, but that he did discuss it with him. Scoville testified that he advised Ford that the rumor was unsubstantiated and that as they went to trial they would "nail it down one way or the other."

In reply, the state asserts that Ford did have the effective assistance of counsel, but first contends that Ford failed to exhaust his state remedy as to this claim on the grounds now alleged.

A. EXHAUSTION

The state argues that the question of whether Ford's counsel *investigated* the rumored pregnancy was never before the state court as a reason for Ford's allegation that his counsel was ineffective. Therefore, the state maintains, Ford has not exhausted his state remedies as to that issue. As authority for this contention, the state cites *Burnside v. Sigler,* 451 F. 2d 987 (8th Cir. 1971) (*per curiam*). In that case the court found that the petitioner had alleged ineffective assistance of counsel at the state level but not on the grounds presented to the federal court. For that reason the circuit court directed that the cause be dismissed for failure of the petitioner to adequately exhaust his state remedies.

The petitioner in the instant case contends that the evidence before this Court is the same as that presented to the state courts and that considering the charge of ineffective assistance of counsel which was before the state courts, the failure to investigate the pregnancy rumor was inextricably a part of the claim that the plea was wrongfully induced.

First, while the clear emphasis of Ford's claim in the state courts was on the alleged promises and threats made to Ford by his attorney to obtain a guilty plea, the general issue of incompetency of counsel was raised and the Nebraska Supreme Court specifically found that "the defendant was represented by competent counsel throughout the original proceedings." *State v. Ford,* 200 Neb. 779, 781, 265 N. W. 2d 456, 457 (1978). Second, even if the theory of ineffective counsel presently advanced by the petitioner was not adequately presented in the state courts, no remedy is now available to the petitioner in the

Nebraska courts. Under Nebraska law, after a first motion for post-conviction relief has been judicially determined, a petitioner is precluded from raising in a subsequent motion for post-conviction relief any grounds which could have been raised in the first proceeding. *State v. Newton*, 202 Neb. 361, 363, 275 N. W. 2d 297, 299 (1979). Existing Eighth Circuit precedent indicates that unless the petitioner has deliberately bypassed state remedies, the exhaustion doctrine does not bar habeas review when no state court relief is available at the time a petition is filed in federal court. *Witham v. Mabry*, 596 F. 2d 293, 299 n. 7 (8th Cir. 1979) (concerning Arkansas post-conviction practice); *Smith v. Wolff*, 506 F. 2d 556, 558-60 (8th Cir. 1974). *Accord, Johnson v. Johnson*, 531 F. 2d 169, 173 (3d Cir.), *cert. denied*, 425 U. S. 997 (1976) (concerning Pennsylvania's post-conviction hearing act). Although the Supreme Court has held that state procedural defaults occurring during trial will also bar federal habeas review absent a showing of "cause" and "prejudice," *Wainwright v. Sykes*, 433 U. S. 72 (1977), this ruling has not yet been extended to post trial defaults.[1]

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1 In *Sykes*, the court questioned the broad language of *Fay v. Noia*, 372 U. S. 391 (1963), which suggested that state procedural defaults were ineffective to bar review of underlying federal claims in federal habeas proceedings, absent a "deliberate bypass" of the state procedures. *Fay* involved the waiver of the right to appeal in state court. Despite the petitioner's failure to appeal his conviction to the stae court, the Supreme Court in *Fay* held that he was nonetheless entitled to raise the claim in a federal habeas proceeding.

In *Sykes*, the Court dealt with the petitioner's failure to object to the admission of his confession at trial. Pursuant to relevant state law, failure to timely object constituted a

(Continued on the next page)

From the record in the instant case, it does not appear that Ford has deliberately bypassed state procedures and the state has not so alleged. The burden of pleading and proving a deliberate bypass is on the state. *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974), *cert. denied*, 420 U. S. 912 (1975). Accordingly, even if the theory of ineffective counsel presently advanced by Ford was not adequately presented to the state courts, under the circumstances of this case the exhaustion doctrine does not prevent review of that claim in this habeas proceeding.

(Continued from the previous page)

waiver. The Supreme Court rejected the deliberate bypass standard announced in *Fay*, and held that with respect to procedural defaults occurring during trial, federal habeas review would be barred absent a showing of "cause" for noncompliance with the state procedure and some showing of actual "prejudice" resulting from the alleged constitutional violation. The Court specifically refused to consider whether *Fay*, which involved waiver of the right to appeal in state court, would be decided differently after the *Sykes* opinion. *Sykes, supra*, 433 U. S. at 88 n. 12.

Although the Supreme Court was careful in *Sykes* to limit its holding to waivers occurring at the trial stage, some of the reasons for its rejection of the deliberate bypass rule seem applicable to any procedural defaults, including post-trial, which rest on adequate and independent state grounds. Since *Sykes*, however, at least one Eighth Circuit opinion has suggested that, with regard to the exhaustion doctrine, where state procedural rules preclude the filing of a second post-conviction petition, federal habeas review need not be dismissed even though the petitioner did not raise all of his claims of error before the state court. *Witham* v. *Mabry*, 596 F. 2d 293, 299 n. 7 (8th Cir. 1979). The court in that case did not discuss either the deliberate bypass rule or the implications of *Sykes*. Given the narrow holding of *Sykes*, however, *Witham* is not necessarily inconsistent with it. Since the Supreme Court specifically chose not to address the question of waivers in state post-trial proceedings, it seems permissible to follow the prior line of authority in the Eighth Circuit and the recent *Witham* decision, which indicate that where waiver in state post-conviction proceedings is involved, federal relief can be denied on exhaustion grounds only if the petitioner has deliberately bypassed the state procedure.

B. FAILURE TO INVESTIGATE

Ford argues that the central issue in this proceeding is whether his trial counsel conducted an appropriate investigation to determine whether the victim was pregnant before allowing Ford to enter a plea of guilty. The rumor of pregnancy is alleged to have been a significant factor in the petitioner's decision to plead guilty, and trial counsel's failure to investigate this rumor before a plea was entered is alleged to have deprived the petitioner of the right to effective assistance of counsel.

As stated in *Morrow v. Parratt*, 574 F. 2d 411, 412-13 (8th Cir. 1978),

> "The evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process in this circuit." *Rinehart v. Brewer*, 561 F. 2d 126, 131 (8th Cir. 1977). First, the defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. (Citations omitted.) Secondly, the defendant must show he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. (Citations omitted.)

See also, *Witham v. Mabry*, 596 F. 2d 293, 298 (8th Cir. 1979).

In regard to the first inquiry, the Eighth Circuit has stated that "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses." *Morrow v. Parratt, supra*, 574 F. 2d at 413. In the instant case, the petitioner's trial attorney apparently recognized such a duty and testified that he told the petitioner that the rumor about the victim's pregnancy was unsub-

stantiated and that they would "nail it down one way or the other" as they went to trial. The question, therefore, is whether an investigation into the rumored pregnancy should have been conducted before a guilty plea was entered. While it seems indisputable that under some circumstances the pregnancy of a rape victim would be a significant factor in deciding whether to enter a guilty plea, it is not apparent under the circumstances of this case that the negotiation of a plea bargain without an investigation of the rumored pregnancy would constitute a failure to exercise the customary skills and diligence of a reasonably competent attorney. The petitioner's attorney testified that:

> A. Well, it [the rumored pregnancy] was part of the over-all picture of the whole thing. We had to communicate it to the Defendant and advise him that if [sic] was unsubstantiated and as we would go to trial we would nail it down one way or the other. But, at that point, it was how it was and it was given to him to use along with all the other bits of information that he had and that we had acquired through our investigations and the County Attorney's Office. It was given to him to reach a defense strategy. I don't think it was a major factor, at least in my awareness, in any decision that was made.
>
> Transcript of post-conviction hearing, May 12, 1977, page 73.

Whether or not it was a breach of duty to negotiate a plea bargain without first investigating the rumor, Ford has failed to establish the second element of a claim of ineffective assistance of counsel, namely, that he was materially prejudiced by the alleged breach of duty. No evidence in the record shows whether, if the attorney had investigated, the pregnancy rumor would have been dis-

covered to be true or false. If the rumor was true, the petitioner does not allege that he would have gone to trial instead of pleading guilty. If the rumor was false, the petitioner has not suggested how the non-pregnancy of the victim could have aided him at trial, since the pregnancy of a rape victim is not an element of the crime, nor is the victim's non-pregnancy an element of any defense. Twice during the post-conviction hearing, in fact, the petitioner testified that he felt that if the victim was pregnant, it was in his favor. The petitioner also testified that he pled guilty "solely because I thought I was going to get two years in the pen." As in *McQueen v. Swenson*, 498 F. 2d 207, 220 (8th Cir. 1974), this appears to be a case where "the petitioner must shoulder an initial burden of showing the existence of admissible evidence which would have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." *Accord, United States v. McMillian*, 606 F. 2d 245, 248 (8th Cir. 1979). Here, the petitioner has not only failed to show that an investigation would have established that the victim was not pregnant, but also how the non-pregnancy of the victim would have aided him in defending the charge of rape.

III.

The petitioner also argues in his brief that his plea was constitutionally defective because the trial court accepted the guilty plea without complying with the requirements set out in *Boykin v. Alabama*, 395 U. S. 238 (1969). *Boykin* held that the waiver of federal constitutional rights that takes place when a plea of guilty is entered in a state criminal trial cannot be presumed from a silent record, and that the record must disclose that a defendant volun-

tarily and understandingly entered his plea of guilty. In *Todd v. Lockhart*, 490 F. 2d 626, 627 (8th Cir. 1974) (*per curiam*), the Eighth Circuit joined a number of other courts in holding that the *Boykin* decision does not require that every plea of guilty be automatically vacated when its precepts are not complied with. Stating that as a constitutional matter the question was whether the plea was voluntary and intelligent, the *Todd* court held that a state may, in a state post-conviction hearing, cure an otherwise defective plea-taking transcript. *Todd, supra,* 490 F. 2d at 627. The *Todd* court also held, however, that the burden is upon the state to affirmatively prove in a post-conviction hearing that the plea was voluntary and intelligent.

In the instant case, the Nebraska Supreme Court granted the petitioner a post-conviction evidentiary hearing on the ground that since the record did not affirmatively show the absence of promises and threats, the record failed to establish that the petitioner entered his plea understandingly and voluntarily. *State v. Ford,* 198 Neb. 376, 378, 252 N. W. 2d 643, 644 (1977). As already discussed, the state court's finding that no promises or threats were made to the petitioner is fairly supported by the record as a whole. Besides the allegation of ineffective assistance of counsel, which has also been disposed of, this was the only claim seriously argued by the petitioner in the state courts. Although in his brief Ford alleges that the record does not show that he was told by the trial judge of the privilege against compulsory self-incrimination, right to confront his accuser, and right to a unanimous jury verdict, the focus of the state post-conviction hearing was not on these issues, and the petitioner has never claimed that he did not understand any of these

rights. Furthermore, *Boykin* has not been read to require the express articulation and waiver of specific rights at the time the plea is entered. *Todd v. Lockhart,* 490 F. 2d 626, 628 n. 1 (8th Cir. 1974). In any event, the record of the arraignment and plea hearing discloses that the trial judge inquired, *inter alia,* as to the factual basis for the plea, whether the petitioner understood what a jury trial was and his entitlement to the same, whether the petitioner had adequate time to consult with his attorney, and whether, knowing the penalty the law provided for, the petitioner still desired to plead guilty. The record of the state post-conviction hearing fairly supports the findings that no promises or threats were made to the petitioner, and that the petitioner was not deprived of the right to effective assistance of counsel. Based upon the petitioner's responses at the arraignment and plea hearing, the record developed at the post-conviction evidentiary hearing, and the fact that this was not the petitioner's first experience with plea bargaining, the Court finds that the petitioner's plea was entered voluntarily and knowingly.

In sum, having carefully examined the record of all the revelant proceedings, involving the petitioner in the Nebraska courts, and having considered the briefs submitted by the parties, the Court finds that the petitioner was not deprived of the effective assistance of counsel and that his plea of guilty was entered voluntarily and understandingly. A separate order in accordance with this memorandum will be entered dismissing the petition for a writ of habeas corpus.

BY THE COURT:
/s/ Albert G. Schatz
JUDGE, UNITED STATES
DISTRICT COURT

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 78-L-209

JESSE J. FORD,

Petitioner,

vs.

ROBERT F. PARRATT, Warden,

Respondent.

ORDER

(Filed June 11, 1980)

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that the petition for writ of habeas corpus in the above-entitled matter should be and the same is hereby dismissed.

BY THE COURT:

/s/ Albert G. Schatz

JUDGE, UNITED STATES DISTRICT COURT

EXHIBIT F

JUDGMENT

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 80-1561 September Term, 1980

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

(Filed March 9, 1981)

APPEAL FROM the United States District Court for the District of Nebraska.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the majority opinion of this Court.

January 21, 1981

A true copy:

Attest:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, 8th Circuit.

EXHIBIT G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

(Filed April 15, 1981)

In accordance with directions of the Supreme Court of the United States, mandate previously issued and sent to the Clerk of the U.S. District Court for the District Court of Nebraska, is hereby recalled and stayed pending the filing and disposition of petition for writ of certiorari. This order is conditioned upon the filing of said petition for a writ of certiorari on or before May 1, 1981.

April 13, 1981

A true copy:

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, 8th Circuit.

SUPREME COURT OF THE UNITED STATES
No. A-817

ROBERT F. PARRATT, Warden,
Petitioner,

vs.

JESSE L. FORD

ORDER
(Filed April 10, 1981)

UPON CONSIDERATION of the application of the Attorney General of Nebraska and the response filed thereto,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 80-1561, be, and the same is hereby, recalled and stayed pending the filing and disposition of a petition for a writ of certiorari. This order is conditioned upon the filing of said petition for a writ of certiorari on or before May 1, 1981. If the petition for a writ of certiorari is filed on or before May 1, 1981, this order shall remain in effect pending disposition of the petition. If the petition for a writ of certiorari is denied, this stay shall terminate automatically. Should the petition for a writ of certiorari be granted, this stay shall remain in effect pending the sending down of the judgment of this Court.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

A true copy ALEXANDER L. STEVAS
Test:

Clerk of the Supreme Court of the United States
Dated this 7th
day of April, 1981.

EXHIBIT H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 20, 1981

EXHIBIT I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

The Court having carefully [considered] appellee's motion for stay of mandate in this cause, it is now here ordered by the Court that motion is denied.

February 20, 1981